Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCvC)-1888–10 OF 2022
LEE SWEE SENG, CHE MOHD RUZIMA AND CHOO KAH SING JJCA
1 FEBRUARY 2024

Arbitration — Stay of proceedings — Steps taken in proceedings — Whether defendant's request at first case management hearing for extension of time to file defence estopped it from later applying for stay of proceedings in order to arbitrate its dispute with plaintiff — Whether making of such request did not amount to 'taking any other steps in the proceedings' under s 10(1) of Arbitration Act 2005 — Whether making of such request was not a clear and unequivocal election on defendant's part to litigate the dispute instead of arbitrating it

On 13 July 2022, the respondent had served on the appellant a writ, amended writ and a voluminous statement of claim setting out details of alleged technical defects in a helicopter that it had purchased from the appellant nine years earlier. The appellant entered a memorandum of appearance on 15 July 2022 and at the first case management hearing on 18 July 2022, requested the court for a one-month time period to file the defence ('the request'). The request was made on the ground that the appellant needed time to get instructions from its parent company/headquarters in France, where the helicopter was manufactured, and also to locate the contract documents relating to the sale of the helicopter. Once it obtained the contract documents, the appellant, instead of filing the defence (the deadline to do so under the Rules of Court 2012 was 9 August 2022), applied on 1 August 2022 for the proceedings to be stayed ('the stay application') under s 10(1) of the Arbitration Act 2005 ('the AA') so that the dispute between the parties could be referred to arbitration pursuant to the arbitration clause in the contract. The respondent objected to the stay application arguing that the appellant was estopped from opting for arbitration as the request was an unequivocal election on its part to abandon arbitration in favour of litigating the dispute. The High Court agreed with the respondent and dismissed the stay application. It took the view that since the request was unqualified, the appellant had signified an intention to litigate the dispute; that the request came within the meaning of 'taking any other steps in the proceedings' under s 10(1) of the AA and therefore the appellant could not backtrack from that election and opt for arbitration. In the instant appeal against the decision, the appellant argued that it since the request was made out of an abundance of caution to safeguard its rights and, more importantly, since no defence was filed, it could not be said that the appellant

had made a clear and unequivocal election to litigate the dispute instead of arbitrating it.

Held, allowing the appeal, setting aside the High Court's decision and ordering the proceedings to be stayed pending reference of the dispute between the parties to arbitration:

(1) In the overall circumstances of the case, the mere request for extension of time to file defence could not be taken to mean that the appellant had evinced an unequivocal intention to proceed with the court proceedings. The request could not be said to be the taking of 'any other steps in the proceedings' in the sense of a significant and definite step in advancing or participating in the proceedings before the court (see para 70).

(2) There was no good reason to disbelieve the appellant when it said through its director that when it was served with the writ on 13 July 2022 and at the time of the first case management hearing on 18 July 2022, the appellant had not obtained the relevant contract documents and only had time to instruct solicitors to act on its behalf and file and serve the memorandum of appearance. Given the voluminous and technical nature of the statement of claim, which ran into some 100 paragraphs, and the fact that the contract documents in the matter were signed some nine years ago, it was not unreasonable that some time was needed for the appellant to retrieve the contract documents and to take instructions from its parent company in France (see paras 27–28).

(3) The appellant had acted promptly in filing the stay application even before the deadline to file the defence (on 9 August 2022) under the Rules of Court 2012. Since the next step in the proceedings after the filing of memorandum of appearance would be the filing of the defence, and the defence was never filed but instead the stay application was filed, the appellant could not be said to have elected to proceed with the court proceedings and to have abandoned arbitration. As such, granting the stay application was reasonable and proper in the circumstances (see paras 29–31 & 37).

(4) It would be prudent for counsel when requesting for extension of time to file defence during a first case management hearing by way of e-review, to reserve the right to apply for a stay of proceedings in the event there was an arbitration agreement, especially when the client was a foreign client or the contract was an industry standard-form contract with or without modifications (see para 70).

[Bahasa Malaysia summary

Pada 13 Julai 2022, responden telah menyampaikan kepada perayu writ, writ pindaan dan pernyataan tuntutan panjang lebar yang membutirkan dakwaan kecacatan teknikal pada helikopter yang dibeli daripada perayu sembilan tahun

terdahulu. Perayu telah memasukkan memorandum kehadiran pada 15 Julai 2022 dan pada pengurusan kes pertama pada 18 Julai 2022, memohon mahkamah untuk tempoh sebulan untuk memfailkan pembelaan ('permohonan'). Permohonan itu dibuat atas alasan bahawa perayu memerlukan masa untuk mendapatkan arahan daripada syarikat induk/ibu pejabatnya di Perancis, tempat helikopter itu dibina, dan juga untuk mencari dokumen kontrak berkaitan penjualan helikopter itu. Sebaik sahaja ia memperoleh dokumen kontrak, perayu, tidak memfailkan pembelaan (tarikh akhir untuk berbuat demikian di bawah Kaedah-Kaedah Mahkamah 2012 ialah 9 Ogos 2022), namun telah memohon pada 1 Ogos 2022 agar prosiding ditangguhkan ('permohonan penangguhan') di bawah s 10(1) Akta Timbang Tara 2005 ('ATT') supaya pertikaian antara pihak-pihak boleh dirujuk kepada timbang tara menurut klausa timbang tara dalam kontrak. Responden membantah permohonan penangguhan dengan alasan bahawa perayu telah dihalang daripada memilih untuk timbang tara kerana permohonan tersebut adalah pilihan yang jelas bagi pihaknya untuk meninggalkan timbang tara dan memilih untuk melitigasikan pertikaian tersebut. Mahkamah Tinggi bersetuju dengan responden dan menolak permohonan penangguhan tersebut. Ia mengambil pendirian bahawa memandangkan permohonan itu tidak berkecuali perayu telah menandakan niat untuk membicarakan pertikaian itu; dan bahawa permohonan itu datang dalam maksud 'mengambil sebarang langkah lain dalam prosiding' di bawah s 10(1) ATT dan oleh itu perayu tidak boleh berundur daripada pilihan tersebut dan memilih untuk timbang tara. Dalam rayuan ini terhadap keputusan itu, perayu berhujah bahawa memandangkan permohonan tersebut dibuat atas dasar berhati-hati untuk melindungi haknya dan, dan yang lebih penting, memandangkan tiada pembelaan difailkan, ia tidak boleh dikatakan bahawa perayu telah membuat pilihan raya yang jelas dan tidak berbelah bahagi untuk membicarakan pertikaian dan bukannya menimbang taranya.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan memerintahkan pendengaran ditangguh menantikan rujukan pihak-pihak ke timbang tara:

(1) Dalam keadaan keseluruhan kes itu, permohonan lanjutan masa semata-mata untuk memfailkan pembelaan tidak boleh dianggap untuk membawa makna bahawa perayu telah membuktikan niat yang tjelas untuk meneruskan prosiding mahkamah. Permohonan itu tidak boleh dikatakan sebagai mengambil 'apa-apa langkah lain dalam prosiding' dalam erti kata langkah penting dan pasti dalam memajukan atau mengambil bahagian dalam prosiding di hadapan mahkamah (lihat perenggan 70).

(2) Tidak ada alasan kukuh untuk tidak mempercayai perayu apabila ia berkata melalui pengarahnya bahawa apabila ia diserahkan dengan writ pada 13 Julai 2022 dan pada masa pendengaran pengurusan kes pertama

pada 18 Julai 2022, perayu tidak memperoleh kontrak yang berkaitan dokumen dan hanya sempat mengarahkan peguam cara bertindak bagi pihaknya dan memfailkan dan menyampaikan memorandum kehadiran. Memandangkan sifat penyataan tuntutan yang banyak dan teknikal, yang merangkumi kira-kira 100 perenggan, dan fakta bahawa dokumen kontrak dalam perkara itu telah ditandatangani kira-kira sembilan tahun yang lalu, adalah tidak munasabah bahawa sedikit masa diperlukan untuk perayu mendapatkan semula. dokumen kontrak dan mengambil arahan daripada syarikat induknya di Perancis (lihat perenggan 27–28).

(3) Perayu telah bertindak segera dalam memfailkan permohonan penangguhan walaupun sebelum tarikh akhir untuk memfailkan pembelaan (pada 9 Ogos 2022) di bawah Kaedah-Kaedah Mahkamah 2012. Memandangkan langkah seterusnya dalam prosiding selepas pemfailan memorandum kehadiran ialah pemfailan pembelaan, dan pembelaan tidak pernah difailkan tetapi sebaliknya permohonan penangguhan difailkan, perayu tidak boleh dikatakan telah memilih untuk meneruskan prosiding mahkamah dan telah meninggalkan timbang tara. Oleh itu, pemberian permohonan penangguhan adalah munasabah dan wajar mengikut keadaan (lihat perenggan 29–31 & 37).

(4) Adalah hemat bagi peguam apabila memohon satu lanjutan masa untuk memfailkan pembelaan semasa pendengaran pengurusan kes pertama melalui e-semakan, untuk merizab hak untuk memohon penangguhan prosiding sekiranya terdapat perjanjian timbang tara, terutamanya apabila pelanggan ialah pelanggan asing atau kontrak itu adalah kontrak bentuk standard industri dengan atau tanpa pengubahsuaian (lihat perenggan 70).]

Cases referred to

Broadcast Solutions Pte Ltd v Zoom Communications Ltd [2013] SGHC 273, HC (refd)

C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd [2019] MLJU 347; [2019] 1 LNS 765, HC (refd)

Carona Holdings Pte Ltd and Others v Go Go Delicacy Pte Ltd [2008] 4 SLR 460, CA (refd)

Central Investments & Development Corporation v Miller Associates Ltd [1982] 133 DLR (3d) 440, SC (refd)

Dian Kiara Sdn Bhd v GCH Retail (M) Sdn Bhd [2020] 12 MLJ 570, HC (refd)

Dynaciate Engineering Sdn Bhd v Punj Lloyd Sdn Bhd [2020] MLJU 2388; [2020] 1 LNS 2252, HC (refd)

Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia (UTHM) [2017] 7 MLJ 274; [2016] CLJU 1170, HC (refd)

IFCI Ltd v Archipelago Insurance Ltd [2022] 2 MLJ 971; [2022] 2 CLJ 535, CA (distd)

A *Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd* [2020] 11 MLJ 442, HC (refd)
Mun Seng Fook v AIG Malaysia Insurance Bhd (formerly known as Chartis Malaysia) [2019] 7 MLJ 59; [2018] 8 CLJ 394, HC (refd)
Nam Fatt Corp Sdn Bhd & Anor v Petrodar Operating Co Ltd & Anor [2010]
B 9 CLJ 732, HC (folld)
Peace River Hydro Partners v Petrowest Corp [2022] SCC 41, SC (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417, FC (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)
C *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625; [2002] 3 CLJ 213, FC (refd)
Usahabina v Anuar bin Yahya [1998] 7 MLJ 691; [1998] 2 CLJ Supp 131, FC (refd)
D *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634, HC (refd)
Yeo Eng Lam v Infinity Vantage Sdn Bhd [2020] 4 MLJ 835; [2020] 6 CLJ 616, CA (distd)

E **Legislation referred to**

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 6
Arbitration Act 1996 [UK] s 9
Arbitration Act 2005 ss 8, 10, 10(1)
Rules of Court 2012 O 3 r 5(3), O 12 r 4(a)
F Rules of the High Court 1980 (repealed by Rules of Court 2012) O 18 r 2(1)

Appeal from: Civil Suit No WA-22NCvC-198–04 of 2022 (High Court, Kuala Lumpur)

G *Manshan Singh (with Ho Pui Yan) (Skrine) for the appellant.*
Farhan Ghani (with Harjoth Singh) (Rozana, Segran & Co) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

H **[1]** It has become an almost reflex action when appearing for the first case management date by way of e-review, for counsel for a defendant to invariably ask for an extension of time to file defence especially when the statement of claim has just been served and when it runs into many paragraphs.

I **[2]** Here the statement of claim had been served just two days before the first case management hearing, running into no less than 100 paragraphs consisting of many more sub-paragraphs of technical details with respect to the malfunctioning of a helicopter.

[3] Little did the defendant's counsel know that such a request would result in the plaintiff vigorously resisting a subsequent application to stay the court proceedings under s 10(1) of the Arbitration Act 2005 ('AA 2005') ('stay application') with the argument being advanced that the defendant had clearly and unequivocally elected to abandon arbitration in favour of litigation before the High Court. Here no defence was filed for as soon as the contract documents were made available by the defendant to its solicitors, its solicitors had promptly filed the stay application.

[4] The High Court agreed with the plaintiff and dismissed the stay application and hence this appeal to the Court of Appeal. Perhaps the position of the law needs some fine-tuning, appreciating the need to be consistent as far as possible with other jurisdictions that have adopted the UNCITRAL Model Law on International Commercial Arbitration.

[5] Section 10 of the AA 2005 mandates the court to stay the proceedings before it if the parties have agreed to arbitration to resolve their disputes unless the party making the stay application has taken other steps in the proceedings or that on the evidence before it, the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[6] Section 10(1) of the AA 2005 reads as follows:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application *before taking any other steps in the proceedings*, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (Emphasis added.)

[7] The courts have moved way past the uncertainty as to whether the entering an unconditional appearance is considered 'taking a step in the proceedings'. The Federal Court in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 had clarified and confirmed that entering an appearance and an unconditional one at that is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the then s 6 of the Arbitration Act 1952 ('the AA 1952') which would prejudice the applicant's right to apply for a stay of the proceedings.

[8] The filing of defence is invariably a step in the proceedings, indicating a clear and unequivocal intention to proceed with litigation. This is so even though there is an arbitration clause in the agreement between the parties where a dispute has arisen out of or in relation or in connection thereto. It does

not matter even if one has not read the arbitration clause or asked whether there was one or addressed the issue of whether there was an option to proceed to arbitration.

[9] The Federal Court in *Sanwell Corp* delineated what is clear with respect to what is included in 'taking any other steps in the proceedings' where entry of appearance and service of pleadings are concerned and left other actions to be determined by the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration. This is how the Federal Court stated the position of the law with respect to the then s 6 of the AA 1952 and by extension, the current s 10 of the AA 2005 at pp 229–230:

> Therefore, the legal position in Malaysia may be neatly summarised as follows:
>
> (a) The entry of appearance is the mandatory procedural step to be taken by an applicant in a proceeding in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings.
>
> (b) If the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration.
>
> (c) If he has taken any other action in the proceedings (other than step (a) or (b) abovementioned), *the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.* (Emphasis added.)

[10] What is less clear is whether a request for an extension of time to file defence ('the request') is also indicating an unequivocal intention to abandon the arbitration agreement and instead proceed with litigation. Has the defendant by so asking, waived its right to arbitration? It would appear that such a determination would invariably be fact-centric and fact-sensitive.

BEFORE THE HIGH COURT

[11] The High Court was satisfied that by not qualifying the request for extension of time to file defence, the defendant had invoked the relevant provisions of the Rules of Court 2012 ('the ROC 2012') which can only signify its taking 'any other steps in the proceedings'. Thus it was then too late to

backtrack and resile from that declared intention made known to the court and to the plaintiff at the first case management hearing.

BEFORE THE COURT OF APPEAL

[12] Before us it was argued for the defendant that the said request was made on an abundance of caution as there was difficulty contacting the parent company of the Malaysian subsidiary as the parent company was in France and there were intervening holidays before the first case management date. Learned counsel for the defendant said he had not sight of the contractual documents yet and so he thought that an extension of time to file defence would be a prudent step to take.

[13] As no defence was filed, the defendant could not be said to have surrendered to the jurisdiction of the High Court and indeed upon realising that there was an arbitration clause, the defendant's solicitors promptly filed the stay application on 1 August 2022. That was before the next case management date of 2 August 2022 and the deadline of 10 August 2022 for the defence to be filed under the ROC 2012.

[14] It was submitted before us on behalf of the defendant that the defendant's action could not, in the circumstances of the case, be interpreted to mean that it had taken 'any other steps in the proceedings' such that the defendant had forfeited its right to proceed with arbitration. Neither could it be said that the mere request was a clear and unequivocal election to proceed in the High Court.

Whether the applicant in the stay application under s 10 Arbitration Act 2005 has shown a clear and unequivocal intention to abandon arbitration

[15] The basic principle must be stated at the outset: an arbitration agreement is a term of the underlying contract and the court would enforce it unless it can be shown that the agreement is null and void, inoperative or incapable of being performed. The Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 had stated the position of the law emphatically as follows:

> [88] The court should lean more towards granting a stay pending arbitration under s 10(1) of the 2005 Act, even in cases where the court is in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the ambit of the arbitration clause ...

[16] If there is a prima facie arbitration agreement the party commencing litigation would be in breach of such an agreement and when objected to by a defendant promptly, the court would generally grant a stay of the court

proceedings unless the defendant had evinced a clear and unequivocal intention to proceed with the suit and not to be bound by the arbitration agreement. The court in line with holding the parties to their bargain instead of allowing a party to breach it, would enforce the arbitration agreement by granting a stay of the court proceedings. Thus in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435, Mary Lim J (now FCJ) explained as follows:

> [36] The whole jurisprudence that has developed around the court's minimum intervention in arbitration is because of the recognition of the parties' freedom to contract, including the freedom to contract on how and where they would like to resolve any dispute or difference that may arise between them. *Where the parties have made that choice in clear and emphatic terms, the Courts tend to lean in favour of upholding such a clause which is after all, a contractually agreed term.* I have myself observed in for example *Government of India v Cairns Energy & Others* [2013] MLJ 123, just as many other courts have, that where the courts sent the parties back to their contractual terms, it is done not because the courts lack jurisdiction. On the contrary, the courts do have jurisdiction. In and when referring the parties to arbitration, *all that the courts are doing is reminding the parties of their contractual obligations and ensuring that the parties keep to their end of the bargain*. It is not for a want of jurisdiction. (Emphasis added.)

[17] The arbitration agreement in the cl 13 of the sales contract read as follows:

> 13. Arbitration
>
> 13.1 The parties agree to use best endeavors to settle by way of direct negotiation any difference or dispute which may occur or arise between them in connection with this Contract.
>
> 13.2 Failing an amicable settlement of negotiations pursuant to clause 14.1 within 14 days of their commencement, either party may refer the difference or dispute for arbitration as provided for in clause 14.3.
>
> 13.3 Any differences or dispute referred to arbitration under this clause 14 must be settled in accordance with the Malaysian Law by one or more arbitrators appointed in accordance with those Laws. Any arbitration proceedings must be conducted in English and unless the parties agree on an alternative location, must take place in Malaysia.

[18] Another way of looking at the situation is from the point of view of whether the defendant has waived its right to insist on going for arbitration or is otherwise estopped from so contending by its action or inaction in court.

[19] Very often during the first case management if not earlier, the solicitors acting for the defendant would request from the court an extension of time to file defence or that they may have written to the plaintiff's solicitors for such an extension and may have obtained the latter's consent to the extension. This is

provided under O 3 r 5(3) of the ROC 2012:

> 5(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

[20] Consistent with the principle that the courts will lean in favour of arbitration if the parties have a clear arbitration clause in their underlying contract, there must then be an equally clear intention reflected in the action of the defendant in not wanting to proceed to arbitration but instead to litigation. After all an arbitration agreement is a term of the contract and one would have thought that the plaintiff would have known of the arbitration agreement too as it would in all likelihood have scrutinised the relevant clauses in the underlying contract before filing its claim in court. It goes without saying that the plaintiff did not at the outset write to the defendant to say that whilst parties had an agreement to arbitrate, it now wanted to litigate and then to seek the defendant's written agreement to vary the mode of dispute resolution to that of litigation instead of arbitration.

[21] To then consciously choose to proceed to court as opposed to arbitration would be to consciously abandon arbitration in breach of the arbitration agreement. Like all agreements, it may be varied by the mutual consent of the parties and where the variation is by conduct, the other party must be judged by its conduct with respect to whether it has accepted the variation in the mode of resolving the dispute.

[22] It is in that context and by that standard, that one must judge the conduct of the defendant in determining if it too has shown a clear and unequivocal intention not to be bound by the arbitration agreement in as much as the plaintiff in commencing the suit, appeared to have elected to come to court instead of going for arbitration.

[23] If asking the right question is the key to finding the right answer, then the right question to ask is whether the applicant in the stay application has waived its right to proceed to arbitration or is estopped from so doing by its action. Has the applicant participated in the court proceedings by 'taking any other steps' such that it could be said that the applicant had foregone arbitration and followed the plaintiff to litigate in court? Has the applicant also preferred to proceed to court just like the plaintiff and indeed has pursued litigation by participating in the process in taking 'such other steps in the proceedings' in court?

[24] The consistent approach of the court has always been to lean in favor of arbitration even when the arbitration agreement is less than clear. Similarly, the

court should be inclined to uphold the parties' declared intention to arbitrate in circumstances where the arbitration clause is clear, despite the defendant's unclear intention as to whether it has agreed with the plaintiff's intention to proceed with the court proceedings in spite of the arbitration agreement, especially when it has yet to take the plunge by filing the necessary documents within the timeline set by the court or in the ROC 2012.

[25] It becomes obvious then that the answers to the questions variously asked to decipher the defendant's intention must be fact-centric and fact-sensitive. The applicant's intention must be assessed from how it has manifested in its actions and when in doubt to look at its actions as to whether the actions are preparatory to and not the actual 'taking any other steps' in the court proceedings.

[26] Thus in *Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd* [2020] 11 MLJ 442, Lim Chong Fong J (now JCA) opined as follows at p 450F-G:

> Put simply, the determination of whether a step had been taken has to be evaluated by examining the defendant's conduct as to whether it had unequivocally made the election to abandon its right to stay the suit for referral to arbitration when served with the suit. It is fact sensitive depending on the circumstances of the case.

[27] In a case like the present case where the request had not been decided by the court we do not think that the applicant/defendant could be said to have made known a clear and unequivocal intention to proceed to court. We have no good reason to disbelieve the defendant when it said through its Head of Legal and Compliance Department that it had not obtained the relevant documents then because the writ of summons was served only on 13 July 2022 and the first case management by way of e-review was on 18 July 2022 and it had only time to instruct its solicitors to act on its behalf and the said solicitors had only time to file and serve a memorandum of appearance.

[28] Moreover, the statement of claim ran into some 100 paragraphs and the contract documents relied on in the statement of claim was signed some nine years ago and it was not unreasonable that some time would be needed to retrieve it and to take instructions from its parent company in France where its headquarter is.

[29] The defendant had acted promptly before the next case management date on 2 August 2022 by filing the stay application on 1 August 2022 even before the time frame to file defence on 9 August 2022 as prescribed under the ROC 2012, before any extension of time was engaged, even assuming for the sake of argument that such an extension had been given.

[30] The relevant O 18 r 2(1) of the ROC 2012 provides the following time frame for a defence to be filed as follows:

> Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action shall, unless the Court gives leave to the contrary, *serve a defence on the plaintiff before the expiration of fourteen days after the time limited for appearing* or after the statement of claim is served on him, *whichever is the later*. (Emphasis added.)

[31] As the writ, amended writ and statement of claim were all served on 13 July 2022, the defendant had 14 days to enter appearance under O 12 r 4(a) which last day would be 26 July 2022, inclusive of the day of service as stated in the amended writ. Thus, the last day to file defence would be 9 August 2022. The next step in the proceedings after the filing and service of the memorandum of appearance would be the filing of defence and as that was never done since a stay application had been filed on 1 August 2022, the defendant cannot be said to have elected to proceed with the court proceedings and to have abandoned arbitration.

[32] To hold otherwise would be to penalise the defendant for his articulated thoughts, that of having thought of filing a defence and so acting on an abundance of caution, asking for an extension of time and before any decision was made by the Deputy Registrar, to then file promptly the stay application. Generally, in civil matters, no one is prejudiced by the expression of a thought unless it is defamatory of the other or putting the other in fear of bodily harm or injury. Thus, no prejudice having resulted from the mere expression of an intention and neither had the plaintiff acted on it to its detriment, the defendant should not be prevented from wanting to honour what both parties had earlier agreed as reflected in the arbitration agreement.

[33] In fact, it is the plaintiff who had been less than candid in wanting to go for litigation without expressing its intention not to want to proceed with the prior agreement to arbitrate and perhaps hoping that the defendant might have forgotten the prior agreement to arbitrate for whatever advantages the plaintiff now perceives the litigation in Kuala Lumpur would give them. An agreement to arbitrate as a preferred mode of resolving dispute should be upheld by the court as a term of the parties' contract with each other unless the defendant has agreed to have the dispute resolved in the courts as the plaintiff might now have preferred by filing a writ action in court.

[34] Absent a clear, unequivocal and irrevocable intention to abandon arbitration though both parties had earlier agreed in the arbitration clause to arbitrate and to agree to and affirm the plaintiff's action in proceeding in court, this court would allow a stay of the court proceedings in favour of arbitration, which remains a terms of the underlying contract. We echo what was held by

A the High Court in *Nam Fatt Corp Sdn Bhd & Anor v Petrodar Operating Co Ltd & Anor* [2010] 9 CLJ 732 ('Nam Fatt Corp'), where it was observed at p 762A-C as follows:

> ... Indeed, there is a palpable paradigm shift in the Arbitration Act 2005 towards affirming parties, agreement to go for arbitration and the court will only refuse the parties intention *if the defendant can be shown to have so irreversibly and irrevocably taken positive further steps in the proceeding that one can affirmatively, assuredly and avowedly say that the defendant has abandoned its intention to arbitrate altogether*. (Emphasis added.)

[35] Assuming for a moment that the plaintiff was itself not aware of the arbitration agreement, for it had been signed some nine years ago, then it should not subject the defendant to a higher standard of wanting to enforce the arbitration agreement, other than that it would suffice if before the filing of defence, and even before the deadline for its filing, it realised that there was actually an arbitration agreement and so acted promptly to file the stay application before 'taking any other steps in the proceedings'.

[36] To dissect and analyse in minutiae the granular ingredients of when one's thoughts and intentions articulated but not yet acted upon should be accepted as 'no sooner said than done' would be to disproportionately dissuade the parties from arbitration in the face of a prior declared intention housed in the arbitration agreement signed by the parties.

[37] There is nothing preventing the arbitration agreement from being honoured; nothing that the defendant had done could be said to be a clear and unequivocal intention to forgo and forsake arbitration in favour of forging ahead with the court proceedings. A stay of the court proceedings would be reasonable and proper in the circumstances of this case.

Whether the request for an extension of time to file defence is a 'taking any other steps in the proceedings'

[38] A survey of the cases in the High Court shows that some courts have taken a rather strict approach and concluding that a mere request for an extension of time to file defence cannot be done without invoking the ROC 2012 and by so doing, one has taken 'any other steps in the proceedings' with the result that it would be too late to file a stay application.

[39] Cases falling on the other side of the line would be cases where the courts have held that it is at most 'a step preparatory to taking a step in the proceedings' and so no punishment or penalty should be visited on the defendant who did not file its defence but instead filed its stay application.

[40] The High Court in *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634 ('Winsin Enterprise') found that the defendant had abandoned its right to arbitration by requesting for time to file defence. It is true that a defence is only filed where a party intends to defend an action. Order 18 r 2(1) of the Rules of the High Court 1980 ('the RHC 1980') provides for that in that a defendant must serve a defence on the plaintiff within the prescribed period unless granted leave to the contrary by the court:

> 2(1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

[41] The High Court observed as follows:

> From the evidence it is clear that the defendant sought and was granted by the plaintiff an extension of time to 21 July 2008 to serve and file the defence. Having evinced such an intention to the plaintiff s 10(1) is no longer available to the defendant. This would be the position whether under the new or old law. In fact, I am inclined to go further to say that because of the language deployed in s 10(1) where stay is now mandatory, subject to the reservations as earlier discussed, applicants who seek to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance.

[42] The High Court case or *Winsin Enterprise* was followed in *Mun Seng Fook v AIG Malaysia Insurance Bhd (formerly known as Chartis Malaysia)* [2019] 7 MLJ 59; [2018] 8 CLJ 394. In that case the relevant facts are as follows:

> [6] The appellant filed a writ of summons dated 14 June 2017 claiming for, inter alia, the sum of RM900,000 for the loss of his left eyesight. The writ and statement of claim ('the writ action') was served on the respondent on 3 July 2017. The respondent filed the memorandum of appearance ('the appearance') dated 10 July 2017. The matter was fixed for case management on 18 July 2017.
>
> [7] During the case management on 18 July 2017, at the requests of the respondent's solicitors, the appellant's solicitors mentioned on behalf of the respondent and requested for an extension of time for the respondent to file the statement of defence until 1 August 2017. The time limit for the respondent to file the statement of defence would have been 24 July 2017. The learned sessions judge granted the extension. At no time did the respondent's solicitors notify the appellant's solicitors or the court of the respondent's intention to apply for stay of proceedings.
>
> [8] On 28 July 2017, the respondent filed the application to stay the writ action.

[43] The High Court in allowing the appeal and in setting aside the order of the sessions court granting a stay of the court proceedings held as follows:

A [21] The learned sessions judge had granted the extension of time for the defence to be filed by the respondent as that was all that the respondent requested and as such, by its own conduct or action, the respondent had waived reliance on the arbitration clause and must be taken to agree that the appellant's claim be resolved in the court. The respondent had utilised the court's process as found in the Rules of Court 2012 B and as such, it must be regarded as having taken a step other than the step of applying for a stay. Section 10 of the Act is no longer available as of right and the application for stay taken out on 28 July 2017 just before the extended time given to file the statement of defence is irrelevant as the respondent has submitted to the jurisdiction of the court and in breach of the mandatory terms of s 10 of the Act.

C

[44] It is important to note that in both the above cases an extension of time to file defence was consented to by the plaintiff and that the defendants there were already into the extended time period when defence was to have been filed before the stay application was filed.

D

[45] Cases falling on the other side of the line where the High Court had decided that a mere request for an extension of time to file defence does not amount to 'taking any other steps in the proceedings' would include the following: *Dynaciate Engineering Sdn Bhd v Punj Lloyd Sdn Bhd* [2020] MLJU E 2388; [2020] 1 LNS 2252 and *Dian Kiara Sdn Bhd v GCH Retail (M) Sdn Bhd* [2020] 12 MLJ 570.

[46] There was also the case of *C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd* [2019] MLJU 347; [2019] 1 LNS 765 where pursuant to the direction F given by the Deputy Registrar during case management the defendant was ordered to file its defence and managed to get the consent of the plaintiff's solicitors for an extension of time to file its defence by 17 January 2019 and the defence filed on 16 January 2019 contained a reservation of the defendant's right to make a stay application which was filed only on 15 February 2019. The G High Court there granted a stay of the court proceedings after satisfying itself that the defendant had not evinced a clear and unequivocal intention not to be bound by the arbitration agreement. See also the case of *Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd*.

H **[47]** Whilst it is always a prudent practice to reserve one's right to proceed to arbitration, all is not lost even if such a reservation has not been made. In the Singapore High Court case of *Broadcast Solutions Pte Ltd v Zoom Communications Ltd* [2013] SGHC 273 ('Broadcast Solutions') it was opined as follows:

I [16] ... It is true that there may be occasions when a defendant expressly reserves the right to apply to set aside a similar order. However, while it would be ideal for a defendant to do this, *the absence of such an express reservation did not transform an equivocal act into a clear submission. Therefore, there was no basis to say that Zoom had submitted to the jurisdiction of the Singapore Court when it filed the first EOT defence*

application. In fact, it was held in *Carona* at [95] that '[a]n application for an extension of time is not in itself tantamount to an unequivocal submission to jurisdiction'. Therefore, *Carona* was authority in favour of Zoom's position on the point rather than Broadcast's. (Emphasis added.)

[48] Whether a request for an extension of time to file defence was 'taking any other steps in the proceedings' must be decided in this instant case against the backdrop of the following relevant facts which are as follows:

(a) the writ, amended writ and statement of claim was served on the defendant on 13 July 2022;

(b) the defendant filed a memorandum of appearance on 15 July 2022;

(c) at the case management by way of e-review on 18 July 2022 the defendant's solicitors requested for an extension of time of one month to file the defence ('the request');

(d) the reason given in its affidavit to stay the proceedings under s 10 of the AA 2005 was that the defendant is a wholly-owned subsidiary of its parent company in France and that the sale contract for the helicopter, the subject matter of the dispute, was executed some nine years ago and was unable to have access to contract by the case management date;

(e) moreover, the defendant's solicitors had difficulty getting instructions from the French headquarters as relevant employees were on leave for the summer holidays in France from 8 July 2022 to 31 August 2022 with 14 July 2022 being a public holiday in France on occasion of Bastille Day and the headquarters in France was closed on 16 July 2022 and 17 July 2022 which fell on Saturday and Sunday which was the weekend before the case management at 9am on Monday, 18 July 2022;

(f) the helicopter, the subject matter of the plaintiff's claim with respect to alleged technical defects, was manufactured by Airbus Helicopters in France;

(g) the defendant's request was made for the sole intention of preserving the defendant's interests in the interim, pending proper instructions being received from its headquarters in France;

(h) the subject matter of the plaintiff's claim in the High Court Suit is voluminous and technical in nature, as evidenced by the statement of claim which contains no less than 100 paragraphs (excluding sub-paragraphs) of allegations of technical defects of the Helicopter supplied under the sales contract;

(i) the defendant's request was not considered by the High Court during the case management on 18 July 2022 as the High Court Suit was

reassigned to another court since the judicial commissioner hearing the case was from the same firm of solicitors as the solicitors now acting for the defendant; and

(j) that the defendant promptly filed its stay application on 1 August 2022 and before the next case management date of 2 August 2022 and the deadline of 9 August 2022 for the defence to be filed under the ROC 2012.

[49] A workable guide to determining if a step is 'before taking any other steps in the proceedings' is perhaps to ask if the step is merely preparatory to 'taking any other steps' or is it 'the step itself' and a request for extension of time to file defence which defence was never filed and which stay application was filed even before the time frame as stipulated in the ROC 2012 for the defence to be filed before the extension of time operates, may well be within the meaning of 'before taking any other steps in the proceedings'.

[50] The Federal Court in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 at p 638; [2002] 3 CLJ 213 at pp 229–230 when considering if 'any other steps in the proceedings' have been taken other than entering its appearance and serving its defence, the court will have to consider *the nature of the action* and whether or not it indicates *an unequivocal intention to proceed with the suit* and to *abandon the right to have the dispute disposed off by arbitration.* (Emphasis added.)

[51] The Federal Court had explained that entering an appearance is a necessary step to be taken even if the defendant wants to apply for a stay application for otherwise a judgment in default of appearance may be entered against it. As for the service of pleadings by the defendant, that would be a clear step in the proceedings.

[52] The Federal Court in giving the above guidance was fully conscious of the fact that there may well be cases where there had been a request for extension of time to file defence but that no defence was ever filed. Such a request may be made orally at the date of the first case management or by way of a written letter to the plaintiff's solicitors or by way of a formal application for extension of time to file defence.

[53] With the greatest of respect, it would be too simplistic and indeed too strict an approach, steeped in technical traps, to say that a mere request for an extension of time to file defence would *ipso facto* tantamount to 'taking any other steps in the proceedings'. An approach consistent with the paradigm shift in encouraging parties to go for arbitration and to hold them to their bargain to so proceed in the arbitration agreement would resonate with the overall focus

of s 8 of the AA 2005 which is that no court shall intervene in matters governed by this Act, except where so provided in this Act. If we may be so bold as to say that when intervention is allowed as in s 10 of the AA it would be more predisposed to promoting the bargain earlier struck by the parties in favour of arbitration considering that the plaintiff had coyly commenced litigation in breach of the arbitration agreement without candidly communicating to the defendant that in spite of the bargain struck it had now no intention of so arbitrating for whatever may be the reasons.

[54] There could be various variations in the circumstances such as a case where even before the extension of time for filing defence is engaged, the stay application has been made, or in another case, the stay application was made during the extended period for filing defence or perhaps in a case where the period to file defence had expired and the defendant is asking for an extension or even a situation where the Deputy Registrar had given direction to file defence by a certain date and the defence is filed with a clear reservation of right to file a stay application for the matter to be referred to arbitration.

[55] The Federal Court had referred to *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691; [1998] 2 CLJ Supp 131 ('Usahabina') and teased out the relevant fact that the defendant had entered an unconditional appearance but failed to file his defence within the time limited for doing so. He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. As the defendant failed to file the defence within the extended period, the plaintiff entered judgment in default. It was only after judgment in default was entered that the solicitors for the defendant drew the attention of the solicitors for the plaintiff to the arbitration clause in their contract document and consequently gave notice that the defendant wished for the dispute to be referred to the arbitrator.

[56] After the defendant had received a copy of the judgment in default, he filed a summons-in-chambers praying for an order that: (a) the judgment in default be set aside; (b) the matter be stayed and/or referred to an arbitrator; (c) alternatively, he be allowed to bring in a third party to the proceedings; (d) alternatively, he be allowed to file his defence and counterclaim.

[57] The Federal Court observed that the defendant's belated attempt to resort to arbitration was an afterthought after judgment in default had been entered against him. The Federal Court also noted that the alternative prayers (c) and (d), ie, that he be allowed to bring in a third party to the proceedings and that he be allowed to file his defence and counterclaim, would also indicate his intention to continue with the proceedings in the High Court. The Federal Court opined that these actions as prayed could arguably constitute additional steps in the proceedings taken by the defendant which would negate his belated

wish to return to arbitration. Having indicated his election to allow the proceedings to go on in the High Court by applying for the extension of time to file his defence, and after having failed to do so within the extended time, it was too late in the day for the defendant to revert to arbitration after abandoning his right to do so. Thus *Usahabina* was a case where the defendant had taken more than one step in the proceedings.

[58] It was in that context that the Federal Court carefully and circumspectly laid down the test that *'if the applicant for stay has taken any other action in the proceedings,* other than step: (a) the entry of appearance; or (b) the service of any pleadings, the court will then have to consider whether such action amounts to a step in the proceedings by determining *the nature of the action* and whether or not it indicates *an unequivocal intention to proceed with the suit* and to *abandon the right to have the dispute disposed off by arbitration'.* (Emphasis added.)

[59] The above approach appears to be consistent with the decisions in other commonwealth jurisdictions.

[60] In the Singapore Court of Appeal case of *Carona Holdings Pte Ltd and Others v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460, the defendant/appellant had filed a stay application of the court proceedings because of an arbitration agreement in a franchise agreement. Before the application could be heard, the plaintiff/respondent's solicitors gave a 48 hours' notice to the appellant's solicitors to file their defence. The plaintiff applied to enter a judgment in default of defence against the plaintiff. The Registrar allowed the default judgment to be entered and made no order on the stay application. The High Court affirmed the Registrar's decision.

[61] On appeal, the Court of Appeal allowed the appeal and set aside the default judgment. The Singapore Court of Appeal laid out the test with respect to whether an act is 'taking any other steps in the proceedings' as follows:

> [93] Having examined the approaches adopted in various other jurisdictions, such as Hong Kong, Malaysia and Canada, it appears to us that the courts in these jurisdictions appear to quite uniformly take into consideration the circumstances enveloping an act in deciding if it constitutes a step in the proceedings. *First, where a party performs or carries out a significant act signifying that it is submitting to the court's jurisdiction rather than to arbitration to resolve the outstanding issues between the parties, that party will be deemed to have taken a step in the proceedings. Second, the act will be regarded as a step in proceeding if it is a step in furtherance of the action by advancing the hearing of the matter in court in contrast to one that serves to smother the action and stop the proceedings dead in its tracks. Third, where a party does an act with the consent of the other party, this will not amount to taking a step in the proceedings.* Finally, the courts usually take the position that parties should not blow hot and cold or equivocate. Instead, they should be decisive about whether they are insisting on arbitration in preference to litigation. Disingenuous reservations will be

disregarded. Should a party wish to proceed to arbitration, that party must be ready and willing to do all things necessary for the proper conduct of the. A

[94] *In our view, an application for an extension of time to file a defence plainly does not constitute a 'step in the proceedings' under* s 6(1) of the Arbitration Act. First, as mentioned earlier, we agree with the views of Woo JC expressed in *Yeoh Poh San* ([21];) that, where a plaintiff's solicitor insists on the filing of the defence notwithstanding the pending application or an appeal therefrom, the defendant's solicitors should then promptly apply for an extension of time to file the defence pending the outcome of the appeal. A pragmatic approach is warranted when assessing the procedural act in question. *We are not impressed by some of the older English cases that appear to place an undue premium on procedural subtleties rather than on the substance of the issue at hand. In our view, it would be a mistake to place too much emphasis on the means adopted rather than on the ends of an application to stay which is to challenge the appropriateness of the court's jurisdiction and to bring an immediate closure to the pending court proceedings.* We should add that citing isolated decisions from other jurisdictions will usually not be helpful in resolving the competing tensions that are almost invariably present in assessing this issue. Each case should be approached and resolved on the basis of principle rather than merely precedent. (Emphasis added.) B C D

[62] The focus should be on upholding the bargain initially struck by the parties to elect arbitration in resolving their disputes and not litigation and to avoid being unduly fastidious with or fixated on technical non-compliance seeking to trip and trap the defendant into litigation when the declared intention in the arbitration agreement is loud and clear. E F

[63] The United Kingdom is not a UNCITRAL Model Law country and so cases on stay of proceedings pending reference to arbitration may not enjoy the same default gravitation towards arbitration unlike Model Law countries that would encourage a hands-off approach where the court's interference is concerned unless expressly provided for under the equivalent of our s 8 of the AA 2005. That said the current s 9 of the UK Arbitration Act 1996 is generously worded to encourage arbitration unless the applicant has taken any step in those proceedings to answer the substantive claim as follows: G H

Stay of legal proceedings

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. I

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

A

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or *after he has taken any step in those proceedings to answer the substantive claim*.

B

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

C

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings. (Emphasis added.)

[64] It would take a massive dose of persuasion to convince the court that a request for extension of time to file one's defence is an answering the plaintiff's substantive claim.

D

[65] The applicant/appellant referred us to the Canadian Prince Edward Island Supreme Court case of *Central Investments & Development Corporation v Miller Associates Ltd* [1982] 133 DLR (3d) 440 ('Central Investments'), where the court held that an application for an extension of time to file a statement of defence for the purposes of receiving proper instruction did not constitute a step taken in the proceedings in view of the complexity and voluminous nature of the case. The Supreme Court held at p 442 that:

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Turning to the second point, reference to *the application to extend time indicates that such extension was for the purpose of receiving proper instructions in order to prepare and file a statement of defence, due to the complexity of the case and its many issues. It should be noted that the statement of claim contained some seventy paragraphs*. The object of the extension was thus 'to receive instructions' only consequent to which could a defence be prepared, or alternatively, such instructions might equally establish to prudent counsel, that no defence was available ...

G

...

... *An application for time to receive proper instructions cannot in my opinion be considered as a thing which would advance the matter for trial*, or of putting the action in such a condition that it might be dealt with by the court. Indeed, the results might well be quite to the contrary, and have the effect of removing it entirely from the court. *I would hold, in consequence, that the application in question is not a step in the proceedings*. (Emphasis added.)

H

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[66] Learned counsel for the applicant/appellant also referred us to the recent Supreme Court of Canada case of *Peace River Hydro Partners v Petrowest Corp* [2022] SCC 41 ('Peace River Hydro Partners') whereby the court affirmed the decision in *Canada Investments*, and held that the very purpose underlying a request for an extension of time to file a defence is to decide whether or not to take a step in the proceedings such that it is not an election

to proceed with the action:

> [97] Determining whether a step in the proceedings has been taken requires an objective approach. The court must ask itself whether, on the facts, the party should be held impliedly to have affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration (McEwan and Herbst, at p 3:27) ...
>
> [98] I acknowledge that the Receiver now argues in this court, for the first time, that requesting the other party's consent to an extension of time to file a defence constitutes a step in the proceedings. Assuming, without deciding, that this submission is properly before our court, I reject it. *In my view, requesting an extension of time cannot be considered a 'step'. In the context of s 15(1), the very purpose of such a request is to decide whether or not to take a step, and there is no election to proceed with the action* (McEwan and Herbst, at p 3:31). Indeed, the result of an extension 'might well be quite to the contrary, and have the effect of removing [the action] entirely from the court' (*Central Investments & Development Corp v Miller* (1982) 133 DLR (3d) 440 (PEISC), at p 442). (Emphasis added.)

[67] The Court of Appeal case of *IFCI Ltd v Archipelago Insurance Ltd* [2022] 2 MLJ 971; [2022] 2 CLJ 535 can be distinguished as there the respondent requested twice for an extension of time to file its defence and both requests were granted and the application for stay was only made after the defence had been filed.

[68] Likewise in the Court of Appeal case of *Yeo Eng Lam v Infinity Vantage Sdn Bhd* [2020] 4 MLJ 835; [2020] 6 CLJ 616 the stay application was filed by the defendant after an application to disqualify the plaintiff's solicitors had been filed and after the defendant had filed its defence and counterclaim. It was a case where both the defendant's hands and feet and indeed his whole body and being were already participating fully in the proceedings in court.

[69] To consider if an action taken is a step in the proceedings, some guidance may be had to the case of *Hamidah Fazilah Sdn Bhd v Universiti Tun Hussein Onn Malaysia (UTHM)* [2017] 7 MLJ 274; [2016] CLJU 1170 where the defendant after being served with the plaintiff's statement of claim had written for further and better particulars of certain paragraphs of the statement of claim. The question was whether the defendant by so doing had evinced a clear and unequivocal intention to abandon arbitration and to elect for litigation to resolve the disputes that had arisen. The High Court held that the said request for further and better particulars must be read in its proper context and it observed as follows:

> [15] Paragraph 2 of the said letter started off by the solicitors for the defendant categorically stating that the action filed by the plaintiff in the High Court is inconsistent with the intention of the parties under cl 67 of the I contract to proceed with arbitration to resolve all matters, disputes and differences arising out of or in connection with the contract. The whole of cl 67 was then set out.

A [16] Paragraph 3 of the said letter reiterates that the reference should be to arbitration as agreed by the parties to the contract.

[17] The last paragraph in para 6 ended with the note that their client, the defendant, shall apply for a stay of the proceedings pending reference to arbitration pursuant to cl 67 of the contract and that the defence be filed after the disposal of
B the application for stay.

...

[20] What is more important was that there was no prayers for an order for better and further particulars to be furnished by the plaintiff and that all the other prayers in the single application filed had been withdrawn with the exception of the prayer
C (c) for the proceedings to be stayed pending reference to arbitration. At most the request for further and better particulars in the whole context of the said letter is only an act preparatory to taking a further step in the proceedings and not a further step in the proceedings.

D **[70]** It would be prudent with the benefits of hindsight to, even in a case of requesting for extension of time to file defence during a first case management by way of e-review, to reserve the right to apply for a stay of proceedings in the event that there is an arbitration agreement especially when the client is a foreign client or the contract is an industry standard-form contract with or
E without modifications. However, in the overall circumstances if this case the mere request here could not be said to mean that the defendant had evinced its unequivocal intention to proceed with the court proceedings as it cannot be said to have 'taken any other steps in the proceedings' in the sense of a significant and definitive step in advancing or participating in the court's
F proceedings.

DECISION

[71] We find merits in the appeal and so the appeal was allowed and the order
G of the High Court was set aside. We make an order of permanent stay of the proceedings in the High Court pending reference of the parties to arbitration with no order as to costs.

Appeal allowed, High Court's decision set aside and proceedings ordered to be stayed
H *pending reference of the dispute between parties to arbitration*

Reported by Ashok Kumar

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